

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DENA PIPKIN, personally and as Personal  
Representative of the ESTATE OF JOSHUA  
HIGHTOWER; RICHARD HIGHTOWER,

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND  
SANTE FE RAILROAD COMPANY, a  
foreign corporation; CREW SHUTTLE  
SERVICE, INC., a foreign corporation,

Defendants.

Case No. C04-5591RJB

ORDER GRANTING MOTION TO  
INTERVENE

This matter comes before the Court on Union Pacific Railroad Company's Motion to Intervene. Dkt. 47. The Court has reviewed all documents filed in support of and in opposition to this motion, has reviewed the entire file, and is fully advised.

**I. BASIC and PROCEDURAL FACTS**

According to the First Amended Complaint ("Complaint"), on September 4, 2003, eight year old Joshua Hightower died while playing with a friend at the Rocky Point Rail Yard. Dkt. 27, at 2-3. Rocky Point is owned and maintained by Defendant Burlington Northern and Sante Fe Railroad Company ("Burlington"). *Id.* Joshua was found by his friend's mother, Angela Moore, after her son ran to her for help, telling her Joshua had been hit by a train. Dkt. 48-2, at 1. The Cowlitz County Sheriff's Office Report indicates that a shuttle crew driver saw the

1 children playing around a work train and then saw a Union Pacific Railroad Company (“Union  
2 Pacific”) train pass going southbound. Dkt. 48-2, at 2. The police report also indicated that  
3 upon examination of the Union Pacific train, the officer saw a “very small dot on the left side of  
4 the hand rail, most forward on the lead train that appeared to possibly have a very small blood  
5 mark on it.” *Id.* at 3. According to Plaintiffs, Plaintiffs and Defendants do not dispute that  
6 Joshua’s death was caused by being hit by a Union Pacific train. Dkt. 53. Union Pacific offers  
7 another explanation as to the cause of Joshua’s death, noting tests results dated May 24, 2005,  
8 indicate the spot found on its’ train to be negative for blood. *Id.* at 6.

9 Plaintiffs sued Burlington Northern under an attractive nuisance theory, later adding  
10 Crew Shuttle Service for failure to warn Joshua of the danger. Dkt. 27. Burlington Northern  
11 removed this matter based on diversity jurisdiction. Dkt. 1.

12 Union Pacific moves to intervene in this matter based on a contract it has with  
13 Burlington Northern. Dkt. 47. According to Union Pacific, the contract may require it to  
14 defend and/or indemnify Burlington Northern for Joshua’s death. *Id.* The contract requires  
15 disputes between its signatories be handled by arbitration. *Id.* at 12.

## 16 **II. DISCUSSION**

### 17 **A. INTERVENTION OF RIGHT - Fed. R. Civ. Pro. 24(a)(2)**

18 Fed. R. Civ. Pro. 24(a)(2) governs applications for intervention as a matter of right.

19 A party seeking to intervene as of right must meet four requirements: (1) the  
20 applicant must timely move to intervene; (2) the applicant must have a  
21 significantly protectable interest relating to the property or transaction that is the  
subject of the action; (3) the applicant must be situated such that the disposition  
of the action may impair or impede the party's ability to protect that interest; and  
(4) the applicant's interest must not be adequately represented by existing parties.

22 *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). All of these requirements must be  
23 satisfied to support a right to intervene. *Id.* Rule 24 generally receives liberal construction in  
24 favor of the party seeking to intervene. *Id.*

1 Plaintiffs do not dispute the timeliness of Union Pacific's application. Dkt. 53 at 7.  
2 Plaintiffs do dispute whether Union Pacific has met the remaining three requirements under Rule  
3 24(a)(2). *Id.*

4 1. SIGNIFICANTLY PROTECTABLE INTEREST

5 "The requirement of a significantly protectable interest is generally satisfied when 'the  
6 interest is protectable under some law, and that there is a relationship between the legally  
7 protected interest and the claims at issue.'" *Arakaki*, at 1084 (*citing Sierra Club v. EPA*, 995  
8 F.2d 1478, 1484 (9th Cir.1993)). In general, an applicant satisfies the 'relationship' requirement  
9 only if the resolution of the plaintiff's claims actually will affect the applicant. *Id.*

10 Union Pacific has significantly protectable interests in this matter. The contract between  
11 Union Pacific and Burlington provides that:

12 Except as hereinbefore provided each railway company from time to time using  
13 the property will assume and pay all loss or damage which its engines, cars or  
14 trains may do to the third persons or to property of third persons, and each  
15 indemnifies the other against all claims and demands for any loss or damage  
16 which it herein agrees itself to bear.

17 In case a suit shall be commenced against any company using the property for  
18 damages for which another user is ultimately liable, the party sued may give  
19 notice to the other party of such suit and thereupon the company so notified shall  
20 assume the defense of the suit and save the company sued harmless.

21 Dkt. 48-3, at 9-10. This language implies that if Joshua's death was caused by Union Pacific's  
22 train, Union Pacific may be liable to Burlington for damages as a result of his death. This Court  
23 is not here making any rulings regarding interpretation of this contract. In any event, Union  
24 Pacific may indeed be held liable to Burlington for damages resulting from Joshua's death or  
25 have a duty to defend Burlington. The possibility of this liability and duty to defend are  
26 significantly protectable interests in this matter.

2. IMPAIRMENT OF INTEREST BASED UPON DISPOSITION OF ACTION

27 Union Pacific's interest could be impaired based upon the disposition of the action.  
28 During arbitration, Burlington may use the fact that in litigation regarding Joshua's death, the  
29 parties agreed that Joshua was hit by a Union Pacific train. Although the contract specifically

1 states, “[t]he parties will settle as between themselves any claim for loss or damage according to  
2 the terms of this contract notwithstanding any judgment or decree of a court or other tribunal in  
3 a proceeding brought by third parties,” (Dkt. 48-3, at 11) the impact of a finding of liability and  
4 damages premised upon Joshua’s death being caused by Union Pacific’s train can not be  
5 underestimated.

6 Moreover, Union Pacific expresses valid concern that Burlington may later, during  
7 arbitration, argue that Union Pacific is collaterally estopped from disputing the cause of Joshua’s  
8 death. Under Washington law, which applies in this diversity matter, the doctrine of collateral  
9 estopped bars the relitigation of an issue where the party estopped has had a full and fair  
10 opportunity to present its case. *Barr v. Day*, 124 Wn.2d 318, 324-25 (1924). The party  
11 seeking to apply the doctrine must establish:

12 (1) the issue decided in the earlier proceeding was identical to the issue presented  
13 in the later proceeding, (2) the earlier proceeding ended in a judgment on the  
14 merits, (3) the party against whom collateral estoppel is asserted was a party to,  
or in privity with a party to, the earlier proceeding, and (4) application of  
collateral estoppel does not work an injustice on the party against whom it is  
applied.

15 *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash.2d 299, 307 (2004).

16 The first and third element are disputed in this motion. The cause of Joshua’s death is  
17 part of the overall landscape of Plaintiffs’ claim. A jury could find that being hit by a train is the  
18 key to why a rail yard is an attractive nuisance for a small child. Even though collateral estoppel  
19 only applies to issues actually litigated, *Id.*, the possibility of this issue being litigated at a later  
20 stage in this case cannot be foreclosed.

21 Plaintiffs argue that collateral estoppel could not be applied against Union Pacific  
22 because it is not a party to this action, nor is it in privity with a party to this action. However,  
23 an exception to the privity element may well apply to Union Pacific here. Washington law  
24 provides an exception to the privity element where a party who was a “witness in an action, fully  
25 acquainted with its character and object and interested in its results, is estopped by the judgment  
26 as fully as if he had been a party.” *Worldwide Video of Washington v. City of Spokane*, 125

1 Wash. App. 289, 306 (2005). Union Pacific's engineers may well be witnesses to what  
 2 happened to Joshua. Moreover, it is fully acquainted with the character of this action and has an  
 3 interest in its results. Union Pacific's interests could be impaired based upon the disposition of  
 4 the action.

5 3. REPRESENTATION OF UNION PACIFIC'S INTEREST BY  
 6 PARTIES

7 Union Pacific's interests will not be adequately represented by the current parties to this  
 8 action. The parties to this action are not currently disputing the cause of Joshua's death. Even  
 9 though Burlington and Union Pacific may have the same initial objective (to defeat Plaintiffs'  
 10 claims) if Burlington is found liable, Burlington and Union Pacific's interests would diverge.  
 11 Union Pacific interests are tied to the cause of Joshua's death. If its train was not involved in  
 12 the accident, it would not be liable to Burlington under the contract. Burlington, on the other  
 13 hand, has an incentive to develop evidence that Union Pacific's train hit Joshua in order to be  
 14 indemnified. Union Pacific's interest are not being fairly represented by the current parties.

15 Union Pacific's Motion for Intervention as of Right should be granted.

16 **B. PERMISSIVE INTERVENTION - Fed. R. Civ. Pro. 24(b)**

17 "Permissive intervention requires (1) an independent ground for jurisdiction; (2) a timely  
 18 motion; and (3) a common question of law and fact between the movant's claim or defense and  
 19 the main action." *U.S. v. State of Washington*, 86 F.3d 1499, 1507 (9th Cir. 1996). Union  
 20 Pacific provides an independent ground for diversity jurisdiction. Plaintiffs, Dena Pipkin and  
 21 Richard Hightower, are citizens of Washington State. Dkts. 27 and 33. Burlington is a citizen  
 22 of Delaware and Crew Shuttle Service Inc. are citizens of Idaho. Dkt. 33. Union Pacific is a  
 23 citizen of Nebraska. Dkt. 47. The amount in controversy exceeds \$75,000. The timeliness of  
 24 the motion is not in dispute. There is a common question of fact (the cause of Joshua's death)  
 25 between this action and any action taken under the contract between Union Pacific and  
 26 Burlington. The principal guide in deciding whether to grant permissive intervention is "whether  
 the intervention will unduly delay or prejudice the adjudication of the rights of the original

1 parties.” Fed. R. Civ. Pro. 24(b). Plaintiffs have made no showing of undue delay. Plaintiffs  
2 raise concerns that an issue that likely was not going to be litigated will now be litigated.  
3 However, in the interests of justice, and in an effort to fully explore the facts in this case, Union  
4 Pacific should be permitted to intervene.


5 **III. ORDER**

6 Therefore, it is now

7 **ORDERED** that Union Pacific’s Motion to Intervene (Dkt. 47) is **GRANTED**.

8 The Clerk of the Court is instructed to send uncertified copies of this Order to all  
9 counsel of record and to any party appearing *pro se* at said party’s last known address.

10 DATED this 25<sup>th</sup> day of July, 2005.

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13 Robert J. Bryan  
14 United States District Judge  
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